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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

REMINGTON INVESTMENTS, INC.,
Petitioner,

v.

XEP NGUYEN aka XEP HUU NGUYEN aka BERNTHAL NGUYEN aka NGUYEN XEP HUU, individually and doing business as FRESH DONUT HOUSE, and QUY HUYNH NGUYEN aka GLORIA HUYNH NGUYEN, individually and doing business as FRESH DONUT HOUSE,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal for the State of California, Second Appellate District, Division Seven

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The FDIC took over a failed bank as receiver, and acquired with its assets a promissory note and security agreement executed by respondents herein. The FDIC then assigned the note, and the collateral represented by the security agreement, to petitioner.

Petitioner sued in California state court for recovery on the unpaid balance on the note, and thereafter petitioner filed a motion for summary judgment. Respondents did not dispute the amount of the unpaid balance, but argued that because the bank had allegedly failed to properly dispose of the collateral pursuant to California Commercial Code § 9504 ("§ 9504"), petitioner was barred from further recovery under the note.

There was nothing in the records of the failed bank regarding disposition of the collateral. Respondents' case was based on testimony of respondents and a former landlord as to what the bank officer allegedly said about taking and disposing of the collateral, and as to the one act of the bank officer requesting the landlord to give him access to respondents' former premises in order to view the collateral. Petitioner's case was based on the express wording of 12 U.S.C. § 1823(e)(1) barring testimony of the bank officer contradicting the records of the failed bank. The state courts agreed with respondents that 12 U.S.C. § 1823(e)(1) somehow did not cover the alleged words of the bank officer.

The questions presented are these:

1. May alleged oral statements of an officer of a failed bank be admitted to create a fact scenario whereby the value of an asset in the hands of the FDIC or its assignee is controlled by state commercial code law rather than 12 U.S.C. § 1823(e)(1)?

2. May oral statements of an officer of a failed bank be admitted to diminish or defeat the value of an asset

taken over by the FDIC, absent any other evidence of actual possession and abandonment under § 9504?

3. What events must be proven by admissible evidence before the alleged failure of a bank to have complied with § 9504 can be used to circumvent the provisions of 12 U.S.C. § 1823(e)(1) and thereby defeat the value of an asset acquired by the FDIC?

LIST OF PARTIES AND RULE 29.6 LIST

The parties in the state action, both at trial and on appeal, were Remington Investments, Inc., an Indiana corporation, petitioner herein, and Xep Nguyen, aka Xep Huu Nguyen aka Bernthal Nguyen aka Nguyen Xep Huu, individually and doing business as Fresh Donut House and Quy Huynh Nguyen aka Gloria Huynh Nguyen, individually and doing business as Fresh Donut House, respondents herein.

Remington Investments, Inc. has no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the court of appeal of the state of California, Second Appellate District, Division Seven, Case No. Civ. B 100281, is reprinted in the appendix hereto as Appendix "A". The California supreme court's denial of the request for review is reprinted in the appendix hereto as Appendix "B". The court of appeal has issued its remittitur sending the case back to the superior (trial) court. The notice of remittitur is reprinted in the appendix hereto as Appendix "C".

JURISDICTION

The denial of the request for review by the supreme court of the state of California was filed by that court on October 22, 1997. This petition is being filed within 90 days of that order. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257(3).

PERTINENT STATUTORY PROVISIONS

The pertinent federal statutory provision in this case is 12 U.S.C. § 1823(e)(1), which is reprinted in the appendix hereto as Appendix "D". The pertinent state statutes, California Commercial Code § 9501(1) through (3) and § 9504(1) and (2), are reprinted in the appendix hereto collectively as Appendix "E".

STATEMENT OF THE CASE

A. Introduction.

On or about February 22, 1990, Independence Bank ("the bank") loaned the sum of $89,985.07 to respondents herein (hereinafter collectively "Nguyen") for commercial purposes, whereby Nguyen executed a promissory note (the "Note") in that amount due and payable on or before December 15, 1993. Said Note was secured by collateral in the form of food processing equipment. Subsequent to the execution of the Note, the bank was taken over by the Federal Deposit Insurance Corporation ("FDIC") as receiver. Thereafter, petitioner Remington Investments, Inc. ("Remington") purchased (and was assigned) the Note and the security agreement on the collateral from the FDIC, which executed an allonge on the Note evidencing said assignment.

Thereafter, Nguyen defaulted in payments on the Note, resulting in a balance due in the amount of $53,795.38. Nguyen has not disputed the unpaid balance on the Note. Although Remington claimed it was electing to seek collection of the amount due under the Note rather than

seek recovery from the collateral, Nguyen argued that Remington really was seeking a deficiency judgment. This in turn was based on Nguyen's allegation that sometime on or about October, 1991, the bank already had taken possession of the collateral and then abandoned it, thereby failing to comply with the requirements of California Commercial Code § 9504 (hereinafter "§ 9504"), and consequently causing the bank (and its successors in interest) to lose its right to a deficiency under the Note.

Nguyen's evidence of the alleged taking possession of, and abandoning of, the collateral consisted solely of the following: (1) the testimony of Nguyen that the bank officer, one Mr. Yokomizo, made an oral statement to the effect that he "agreed to take possession of the collateral, sell it, and use the proceeds to offset the remaining principal balance outstanding on the loan"; (2) an unsigned piece of paper with the bank logo on it containing only the printed words "written authorization to turn [sic] the equipment to Bank, and have us sell it"; (3) Nguyen's further testimony that the bank officer made the oral statement that "[he] told me to leave the equipment at the Shop and he would arrange to have it picked up, appraised and sold"; and (4) the testimony of one Kathleen Wedgewood, the property manager of Nguyen's landlord SAMKO, that the bank officer made the oral statement that:

> Mr. Yokomizo then informed me that he would contact me as to what the Bank intended to do with the collateral when he returned to his office. Mr. Yokomizo called me later that day and informed me that the Bank had just been seized by the FDIC, that he would not be able to get to his file anytime soon, and that we should now consider the equipment the property of SAMKO. I asked Mr. Yokomizo for a letter confirming this, but he refused.

Ms. Wedgewood also testified that she gave Mr. Yokomizo access to the premises to view the collateral. There

was no testimony that Mr. Yokomizo was ever given a key to the premises, that he ever physically took possession of the collateral, or that he ever moved the collateral. No one testified as to what actually ever became of the collateral.

B. Proceedings and disposition in the state courts.

On June 1, 1995, Remington filed suit against Nguyen in state court for the balance due on the Note. As the collateral seemed to have disappeared, Remington elected to seek recovery on the Note itself rather than look to any collateral. When discovery demonstrated no apparent defense to the debt, Remington filed a motion for summary judgment for the balance due. Nguyen filed a counter-motion for summary judgment, alleging that as the evidence of what the bank officer said was undisputed and therefore must be taken as fact, and as these facts established a case of improper abandonment of the collateral, the bank's failure to comply with the provisions of § 9504 created a defense against collection of any balance due on the obligation.

Remington had no way of locating the bank officer to see if he could or would contradict his alleged testimony. Regardless, Remington did not believe that this was required or even admissible under the express provisions of 12 U.S.C. § 1823(e)(1). In fact, even if Mr. Yokomizo's testimony had been available, and he was of a mood to testify on behalf of Nguyen as to an agreement on his part that would diminish or destroy the value of the asset, such testimony would not be admissiole under 12 U.S.C. § 1823(e)(1) to contradict the official bank record that showed the existence of the asset, including its collateral. That being the law, Remington argued that certainly a third party's testimony that Mr. Yokomizo had so agreed would be even less admissible under 12 U.S.C. § 1823(e)(1). Remington supported its argument with federal cases which clearly had gone beyond the original

fact situation of *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), and which had uniformly precluded any type of alleged agreement by a bank officer not in the bank's official records, that could impair the collateral, including alleged accords and satisfaction, and substitution of other collateral.

Nguyen presented federal cases holding that once the bank took possession of the collateral, and then failed to properly dispose of it under § 9504, there was no longer merely an "agreement impairing the asset", but an improper *action* under state law which barred further recovery under the Note, thereby removing the case from the control of 12 U.S.C. § 1823(e)(1). Remington did not dispute the existence of this concept, but distinguished the concept by noting that such federal case law was not relevant to the case herein, as here there were no physical acts which resulted in the taking of possession, actual or constructive, by Mr. Yokomizo on behalf of the bank. Remington pointed out that Mr. Yokomizo's alleged *statements* of intent to take possession (and supposed abandonment to Ms. Wedgewood) were not present in the fact situations discussed in Nguyen's federal cases, and remained barred by federal law. Remington argued that Mr. Yokomizo's alleged statements, if taken together and admitted, certainly comprised an agreement that would affect the value of the asset by creating the very scenario desired by the debtor, namely that it would release the debtor from the entire balance of the obligation.

At the hearing on the summary judgment motions, the superior (trial) court agreed to accept Nguyen's and Wedgewood's testimony as to what Mr. Yokomizo allegedly said as evidence of possession and abandonment. The trial judge stated that Mr. Yokomizo's agreement to take possession of the collateral was not the type contemplated by federal law as being inadmissible to contradict the bank's records (even though it certainly did create a contradiction to what otherwise appeared to be

a valuable asset taken over by the FDIC, upon which Remington relied when purchasing the asset). As to the abandonment, the trial judge stated on the record, "it was like they sort of put it out on the parking lot, and said, 'Here, public, come and take this stuff' ". In the process of trying to justify a conclusion he apparently had reached already, the trial judge assumed two facts nowhere in evidence: First, that Mr. Yokomizo was even physically able to take possession (he had only been let into locked premises by Ms. Wedgewood to view the collateral, and had walked out without it), and, second, that he had moved it to another location.

The trial court subsequently corrected its fact conclusions by stating ". . . the bank just sort of said, 'Well, we don't know what to do with the . . . equipment, so we're just going to leave it here.' And that's really what happend, I think." In spite of this, the trial court affirmed possession and abandonment and gave summary judgment to Nguyen. In the process, it made three grievous errors. First, it finally admitted that the bank did not actually take possession, but only decided not to. The trial court still concluded, however, that an alleged agreement to take possession triggers the requirements of § 9504. Second, the trial court wrongly concluded that such an agreement was not intended to be barred by § 1823(e)(1). Finally, the trial court made its third error by stating that a certain California case, *Barber v. LeRoy*, 40 Cal. App. 3d 336 (1974), required that the creditor attempt to reduce the debt by taking and selling the collateral. *Barber v. LeRoy* does not stand for that proposition. The *Barber* court dealt with a case in which the bank *already had taken physical possession* of the property and thereafter failed to comply with proper sale requirements under § 9504, thereby losing the right to obtain a deficiency. *Barber v. LeRoy* never contradicted a creditor's clear right to the election of remedies provided by California Commercial Code § 9501. In fact all California case law on the subject is clear that the creditor does not have to

first seek recovery from the collateral before suing on the underlying debt.

In its appeal, Remington relied on the *D'Oench, Duhme* doctrine and related federal and California cases, and 12 U.S.C. § 1823(e)(1), to argue (a) that all the evidence of the alleged oral agreements of the bank officer in relation to the asset was inadmissible; (b) that the FDIC and its assignee, Remington, were entitled to rely solely on the written bank records; and (c) that the trial court was obligated to base its conclusions only on those records. Remington further argued that the whole purpose of *D'Oench, Duhme* and its statutory and case progeny was to avoid testimony by debtors (and even bank personnel) which the FDIC and its assignees would almost never be in a position to refute.

In response to Nguyen's § 9504 arguments, Remington argued that, even if the *D'Oench, Duhme* doctrine did not exist to bar the alleged oral agreement of the bank officer, that person's failure on behalf of the bank to actually take possession did not constitute an election coupled with a failure to properly notice and sell as required under § 9504. In fact, the bank officer elected to *not* take possession of the equipment. Therefore, the bank, or the FDIC, or its assignee, were still free to make an election to sue on the Note, rather than seek recourse from the collateral.

The court of appeal affirmed the decision of the trial court and in the process made even more unfounded fact conclusions as to what had transpired. That court stated that 12 U.S.C. § 1823(e)(1) did not apply because it dealt only with agreements, and then stated that "Mr. Yokomizo's advice to Nguyens that the bank would take and sell the collateral was not an 'agreement'. Rather it was an instruction directing Nguyens to comply with the requirements of a pre-existing agreement." (Pet. App. A, p. 6a). Later the court of appeal deviated from this approach by stating on the same page, "the interests

of Bank and FDIC were defeated, not by Yokomizo's advice to Nguyens of Bank's intent to repossess, but rather by his later careless *conduct* in giving away the collateral to SAMKO" [emphasis supplied]. (Pet. App. A, pp. 6a-7a.)

In other words, having first destroyed the clear evidentiary protection afforded to the FDIC and Remington by federal law, the court of appeal then dispensed with federal law as even being a deciding issue, and based its decision to affirm on what it termed "conduct", rather than agreements. However, other than Mr. Yokomizo's act of requesting that Ms. Wedgewood (the SAMKO property manager) let him onto the premises to view the equipment, the court of appeal could cite from the record no alleged "conduct" comprising a further course of *activity* by Mr. Yokomizo, and the court of appeal could only find from the record the further alleged *statements* to Ms. Wedgewood that because the FDIC had taken over the bank, he was not in a position to make a decision as to the collateral and that "she could have" the equipment.

In conclusion, the court of appeal found a way to make the statements of an officer of a failed bank into a § 9504 issue, with no regard for the specific requirements of federal law barring such statements.

REASONS FOR GRANTING THE WRIT

The whole purpose behind passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") was to allow the FDIC to accurately evaluate the assets of the bank, and in the case of failure, to maximize the return on those assets. The federal statute clearly pre-empts any application of state law which would give a debtor, particularly one who otherwise was clearly in default on the debt, an opportunity to testify as to a fact situation that would defeat the Congressional intent. This is particularly true where the FDIC or its assignees would be unable to produce the bank officer to

contradict the testimony of the debtor or his/her friendly witnesses.

The California court of appeal made every effort to avoid the fact that relying on the words allegedly spoken by Mr. Yokomizo places the case squarely under the controlling federal FDIC law, which bans the admissibility of such words to affect the value of an asset of a failed bank. The court of appeal offered no case law whatsoever to support its approach (or indeed any part of its opinion), but merely reaffirmed the trial court opinion that "this was not the type of agreement contemplated by *D'Oench, Duhme*".

The opinion of the court of appeal simply bounces back and forth between acts and words in order to avoid the clear intent and applicability of either federal law or state law regarding the required conduct, rather than mere words, necessary to trigger the applicability of § 9504. In the process, the court of appeal allowed these debtors to fashion a scenario which would permit the destruction of the value, upon which the FDIC and its assignees rely, of any bank asset secured by collateral. That is hardly what Congress intended with its enactment of FIRREA. Remington submits that this is just one more fact scenario that should be added to the long list of those ruled by federal (and even other California) courts as being precisely covered by *D'Oench, Duhme* and 12 U.S.C. § 1823(e)(1).

A review of the opinion (Appendix "A") of the California court of appeal shows what little regard it has for the intent and purpose of the controlling federal law.[1] It

[1] As this Court is aware, Remington recently has filed a petition with this Court for a writ of certiorari to another California court of appeal decision (Remington v. Hamedani), involving a different set of facts. However, the issue is similar in that the Hamedani court of appeal also ignored the supremacy of FDIC-related federal law by applying a state custodian of records evidentiary requirement. It appears that these two California courts of appeal do not understand when state evidentiary rules must give way to the relevant federal evidentiary rules in FDIC-related cases.

also shows how that court contorted its fact conclusions and assumptions in an attempt to avoid the application of 12 U.S.C. § 1823(e)(1) and to claim that the case should be considered instead as purely subject to state law under § 9504. It certainly opens a Pandora's box to a number of new creative fact situations in which debtors will be permitted to argue that "this is not an agreement covered by 12 U.S.C. § 1823(e)(1)."

In all of the federal cases that found a different set of facts beyond the pale of § 1823(e)(1), and therefore which permitted § 9504 to bar recovery by the FDIC or its assignees, the fact situations therein clearly showed that the bank *had* taken possession of the collateral, and then had either failed to give proper notice of sale to the debtor, or failed to conduct a commercially reasonable sale. Not one of these cases dealt with a situation where the bank officer said he would take possession and then changed his mind, nor where he allegedly said not only that the bank did not want to take possession, but that some third party could have the collateral.

The fact that some federal courts have found an exception to the prohibition contained in 12 U.S.C. § 1823(e)(1) as to anything not in the official bank records, may have caused some confusion as to how far that exception may be extended. Assuming that this Court approves of the lower federal courts' allowance of § 9504 exceptions as to what may be admitted to defeat the value of a bank asset in the hands of the FDIC, the state courts need instruction on the line that must be drawn between allegations of what a bank officer said or did, and solid physical evidence that the bank in fact did it. 12 U.S.C. § 1823(e)(1) must remain in control in the former situation, and § 9504 can only be allowed to replace 12 U.S.C. § 1823(e)(1) when it is clear that the latter situation took place. Remington respectfully submits that the writ should be granted so that Pandora's box can be closed without delay.

I. THE RELEVANT STATUTORY AND CASE LAW

A. The intent and purpose of 12 U.S.C. § 1823(e)(1).

In the seminal case of *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), the FDIC acquired promissory notes from a failed bank which evidenced a borrower's indebtedness to the bank. The bank apparently also gave the maker of the notes a writing that memorialized an agreement that the notes would not have to be paid, but this writing was not in the bank records taken over by the FDIC. This Court held that the maker remained liable to the FDIC on the notes because a secret agreement which diminished what appeared to be bank assets on which regulators were entitled to rely, was contrary to federal banking policy. *Id.* at 459. The Court stated as follows:

> Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced.

Id. at 459.

Thereafter, Congress addressed this concern in an all-encompassing manner. Rather than limit the doctrine to any one set of circumstances (i.e. just to the facts of the *D'Oench, Duhme* case), Congress said the bank records could never be contradicted unless by other official documents in the bank file. The applicable statute is 12 U.S.C. § 1823(e)(1), which states:

> No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance] Corporation in any asset acquired by it under this section . . ., either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement
>
> (A) is in writing,

> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously from the time of its execution, an official record of the depository institution.

This Code section makes it clear that Congress intended that the FDIC's collection rights are superior to the bank's, and that the FDIC should not be barred by defenses which would have barred the bank from recovery.

Congress did not expressly define the term "agreement". But it should be clear from the overall intent of the statute, as well as from cases decided by both federal and state courts, that 12 U.S.C. § 1823(e)(1) was not limiting the term to a formal contract, but rather to any expression by a bank officer not formalized in the bank records, which expression would affect the value of the asset.

In *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691 (5th Cir. 1991), the court stated:

> *D'Oench, Duhme* [citation] protects the FDIC and its assignees from unrecorded side agreements not reflected in the bank's records. . . . *It allows the FDIC to rely on the official bank records to the exclusion of any extraneous matters* [emphasis supplied], to set forth the rights and obligations of the bank and those to whom it lends money.

Griffin, 935 F.2d at 697.

Nowhere in the *Griffin* case did the court distinguish between unrecorded side agreements that affect the original loan contract, and unrecorded side agreements which

allegedly deal with the disposition of the security for the agreement, and therefore had a later impact on the loan obligation.

It certainly appears that the phrase "extraneous matters" covers the alleged expression of an intent to make an election of remedies under the commercial code, particularly where the debtor then goes on to testify that the remedy allegedly elected was not properly carried out. Such testimony, if permitted, defeats the value of the asset without the FDIC having any knowledge of such events from a review of the bank's official records.

In *Langley v. FDIC*, 484 U.S. 86 (1987), this Court explained that:

> [O]ne purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets, . . . [n]either . . . would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

Langley, 484 U.S. at 91-92.

Under the *Langley* rules, even if Mr. Yokomizo had written out and signed all the material upon which the California court of appeal relied as to his alleged oral statements to Nguyen or to Ms. Wedgewood, and such handwritten notations were part of the bank file obtained by the FDIC, these notes would be inadmissible to defeat the right to collect on the note. Such notes would not comprise the type of bank records clearly required by 12 U.S.C. § 1823(e)(1).

Of even greater importance, it is clear under the controlling federal statutory and case law that even if Mr. Yokomizo had wanted to testify in person for *Nguyen* that he had made all the statements attributed to him, such testimony would be inadmissible. Yet the trial court and the court of appeal herein admitted, and then relied on, the *debtor's* testimony as to what Mr. Yokomizo al-

legedly said. The California courts' complete avoidance of the provisions, intent and purpose of 12 U.S.C. § 1823(e)(1) is grievous error that requires correction by this Court.

There is a sound public policy basis for excluding all such alleged statements by a bank officer. A bank officer could have been fired or be upset by losing his job with a failed bank, and be willing to testify that he entered some agreement to defeat the bank, and its successor's, rights to collect on a loan. A disenchanted or dishonest bank officer may well hold a higher loyalty to a borrower who was a friend or *sub rosa* business associate.

12 U.S.C. § 1823(e)(1) has been applied at the behest of the FDIC and its assignees to defeat the claims and defenses of borrowers based on a wide variety of alleged agreements whose only flaw was their failure to meet the requirements of the statute. *See, e.g., E.J. Sebastion Assocs. v. RTC*, 43 F.3d 106 (4th Cir. 1994) [12 U.S.C. 1823(e)(1) & *D'Oench, Duhme* may be applicable to alleged oral contracts of the bank for services that do not involve lending of money]; *FDIC v. Betancourt*, 865 F. Supp. 1035 (S.D.N.Y. 1994) [an agreement is barred which states that surplus funds from a certain check would be applied against future loan obligations where the notes in the bank's records were not marked as cancelled]; *FDIC v. Karris*, 844 F. Supp. 1438 (D. Kan. 1994) [side agreement that the bank told the borrower that the notes would be paid by the sale of certain assets was barred because the alleged agreement was not contained in the official records of the lender]; *Cutler v. FDIC*, 796 F. Supp. 598 (D. Me. 1992) [high bidder at a foreclosure sale cannot assert changes in the bid not approved by the bank's loan committee prior to the FDIC takeover].

See also FDIC v. Bathgate, 27 F.3d 850 (3d Cir. 1994) [holding that a letter from the bank offering to consolidate debts could not be offered to prove accord and satisfaction]; *RTC v. Midwest Federal Savings of*

Minot, 4 F.3d 1490 (9th Cir. 1993) [all the requirements of the statute must be met; federal and state bank examiners are not bound to only partial compliance]; *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1989), *cert. denied*, 504 U.S. 909 (1992) [holding that the *D'Oench, Duhme* doctrine applied even though the only fault on the part of the borrower was her failure to reduce the agreement to writing]; *FDIC v. Hoover-Morris Enter.*, 642 F.2d 785 (5th Cir. 1981) [barring an alleged agreement to take a deed as satisfaction of debt in lieu of the required payment]; *Black v. FDIC*, 640 F.2d 699 (5th Cir.), *cert. denied*, 545 U.S. 838 (1981) [barring an unwritten understanding to make new loans on certain real estate and disregard prior tardiness of the obligors on existing loans].

These cases did not limit the application of the exclusionary rule to any specific type of agreements. They clearly show that no words of any kind uttered by a bank officer will be admitted, which words were not formalized in the bank's official records as required by the statute and which have the effect of reducing or eliminating the value of a bank asset taken over by the FDIC. In *Federal Sav. & Loan Ins. Corp. v. Gemini Management*, 921 F.2d 241 (9th Cir. 1990), the court specifically referred to "abuses the *D'Oench* Court could not have imagined or predicted", and stated that now more than ever, the protective shield of the *D'Oench, Duhme* doctrine should be applied. *Gemini*, 921 F.2d at 245.

California courts have addressed the same issues with the same conclusions. In *Walsh v. New West Federal Sav. and Loan*, 234 Cal. App. 3d 1539, 1 Cal. Rptr. 2d 35 (1992), the debtors were in default and nearing foreclosure on land that secured a debt to the original lender, State Savings. The debtors alleged that they then entered a side agreement with an agent of State Savings for an exchange of security which was not reflected in the bank's records. The *Walsh* court affirmed the trial court's *exclusion* of debtors' attempt to offer evidence of such a side agreement. The *Walsh* Court stated that:

> The [*D'Oench, Duhme*] doctrine also seeks to ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure."

Walsh, 234 Cal. App. 3d at 1544.

The *Walsh* case is similar to the case on appeal herein, as Nguyens herein are arguing that they are not liable for a default situation because of an alleged side agreement with an agent of the bank to take possession of the security, and that the breach of his obligation to do so was a defense against the obligation.

There is no logical basis to distinguish between the applicability of *D'Oench, Duhme* to alleged side agreements (not in the banks records) to take possession of the security in the face of a default, and to alleged agreements to exchange the security in the face of a default as in the *Walsh* case. The *Walsh* court went on to state:

> A primary purpose of the doctrine 'is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets.' . . . Thus the doctrine encourages debtors to memorialize all agreements in writing and reflects the equitable principle that losses incurred as a result of unrecorded arrangements should not fall on deposit insurers, depositors, or creditors, but rather upon the person who could have best avoided the loss."

Id. at 1544 [quoting *Langley v. FDIC*, 484 U.S. 86, 91 (1987)].

Even though the *Walsh* facts are noticeably different from those in *D'Oench, Duhme*, and the Walshes were innocent of wrongdoing, the *Walsh* court went on to say:

> Nonetheless, mindful of the federal court's [sic] expansive interpretations of the doctrine and consistent with the authorities cited above, we conclude this case comes within the *D'Oench, Duhme* doctrine because (1) the Walshes are attempting to enforce an

> oral agreement [with Gallegos] . . . (2) which would reduce the value of assets formerly held by State Savings.

Walsh, 234 Cal. App. 3d at 1545.

The trial court and the court of appeal in the case herein tried to characterize the statements of Mr. Yokomizo as something other than an agreement, and therefore not covered by 12 U.S.C. § 1823(e)(1). However, the *Walsh* court stated that the bar to admissibility was not limited only to *agreements*, but could also be applied to "unrecorded *arrangements*", which is precisely on point here. Furthermore, the *Walsh* court stated:

> The doctrine has been expanded to encompass *any* claim against an insolvent institution that would either diminish the value of the assets held by the FSLIC or increase the liabilities of the insolvent institution (citing several federal opinions).

Walsh, 234 Cal. App. 3d at 1544.

The California court of appeal in the case herein simply ignored the very thorough analysis of federal law by the (California) *Walsh* court of the relevant issue, and made a mockery of the principals set forth therein. As a result, the contradictory opinion of the California court of appeal herein will simply encourage debtors in default to create new fact situations, not already expressly dealt with in existing California or federal case law, about what a bank officer said. It is obvious from all the cases cited above, that the clear intent of the federal statute was to exclude any such testimony, regardless of what allegedly was said by an officer of a failed bank, or what fact situation could then be further alleged from it. If the end result is to diminish the value of the asset taken over from the failed bank by the FDIC, the testimony is simply inadmissible.

It follows therefore that each and every one of the novel characterizations of Mr. Yokomizo's alleged statements which the California court of appeal has created in its opinion (i.e. the statements were "advise", an "in-

struction", "notice", a statement "giving away the collateral to SAMKO"), are nothing more than a repetitive disregard of the controlling federal law as set forth in 12 U.S.C. § 1823(e)(1) and the cases decided thereunder.

B. California Commercial Code § 9504 was incorrectly applied as an exception to 12 U.S.C. § 1823(e)(1).

§ 9504 sets forth the procedures for the repossession and sale of collateral if the creditor *chooses* to take the collateral and then still wishes to collect a deficiency. Nowhere does this section require that the collateral be taken in lieu of a judgment for money damages. The protections for the debtor in § 9504 are designed to keep the creditor from taking valuable collateral, selling it short, and then seeking an excessive deficiency. In fact, § 9504 begins with the words "A secured party after default *may* [emphasis supplied] sell, lease or otherwise dispose of any or all of the collateral". The secured party retains the option until it has clearly taken possession of the collateral. California Commercial Code § 9501 states, in subsection one thereof, "[t]he secured party may reduce his or her claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure."

In *Bank of California National Association v. Leone*, 37 Cal. App. 3d 444, 112 Cal. Rptr. 394, the *Leone* court, after quoting the above portion of § 9501, stated that this section permits:

> [a] creditor [to] elect to sue on a secured debt without resorting to the security. [citations omitted]. Since 1965, section 726 of the Code of Civil Procedure has not required foreclosure before suit on a debt secured on personal property; consequently a secured party need not exhaust his collateral to obtain a personal judgment. [citation omitted] Respondent was not required to repossess the vending machines before suing on the two notes which were covered by financing statements.

Leone, 37 Cal. App. 3d at 447.

In *Taylor v. Bouissiere*, 195 Cal. App. 3d 1197, 241 Cal. Rptr. 253 (1987), the *Taylor* Court stated that "if the security is personal property, the creditor's right to sue for personal liability on the debt is not restricted by any obligation to look first to the security." *Id.* at 1199.

In *Brunzell Const. Co., Inc. v. Smith,* 200 Cal. App. 3d 617 (1988), the court found that a number of acts related to seeking or asserting claims to possession did *not* constitute a reposession and thereby trigger the requirement of a § 9504 sale.

The case herein adds a unique additional fact. The testimony of Ms. Wedgewood, upon which the state courts placed such reliance, makes it clear that even if Mr. Yokomizo's original intent was to repossess the collateral, his mind was perforce changed for him by the FDIC takeover. Furthermore, she certainly could not rely on his alleged "gift" to her of the collateral, because he had just told her that because of the FDIC takeover, he no longer had the authority to make a decision. Furthermore, she admits that he refused to put the alleged oral statement as to the "gift" in writing. However, even if he had put it in writing *and it was in the bank's records*, it would *not* be admissible as the kind of official bank document required under 12 U.S.C. § 1823(e)(1) before it could be admitted to diminish the value of an asset in the hands of the FDIC.

None of the federal cases that did use § 9504 to preclude recovery dealt with mere expressions by a bank officer regarding an intention to repossess the collateral. All of these cases contained the fact scenario wherein possession *clearly had taken place* and then the bank failed to follow the procedural and notice requirements of § 9504. Once it is clear the bank has taken possession of the collateral to the extent that such possession should clearly be held to be an election of remedies, and the bank then fails to dispose properly of the collateral, the

federal courts have held that 12 U.S.C. § 1823(e)(1) no longer applies because, under those circumstances, agreements by bank officers to do something in relation to the asset are not the issue. Remington does not dispute this reasoning, but the latter fact situation is irrelevant to the case herein, which turns only on what Mr. Yokomizo said. Likewise, there are no California cases (prior to the one herein) where anything remotely similar to the alleged acts of Mr. Yokomizo comprised an irrevocable election. Yet the California court of appeal herein, with no authority whatsoever, found acts of possession (in order to avoid the pitfalls of calling it an agreement to possess) from the bank officer's "later careless conduct in giving away the collateral to SAMKA", a fact conclusion which relied only on what Mr. Yokomizo allegedly *said*. (Pet. App. A, p. 7a.)

There is only one piece of evidence as to Mr. Yokomizo's *conduct* (as distinguished from his communications) contained in Ms. Wedgewood's declaration. In this regard, she states only that Mr. Yokomizo came to her to view the collateral, and she gave him access to the shop to do so. This is not an act of possession. She said nothing about any other act whatsoever, or any act that could possibly support a finding that Mr. Yokomizo actually took possession. Nguyen's own testimony refers only to statements of the bank officer, and does not identify any acts whatsoever.

If ever a bank officer's statements are *in*admissible under 12 U.S.C. § 1823(e)(1), those offered by Nguyens in this case fit such a prohibition. Yet the California trial court and court of appeal (in the latter case by characterizing them as conduct rather than words) not only admitted these statements, they coupled them with the *solitary act* of going to view the collateral, so as to find that the bank officer had taken possession and thereafter abandoned the property.

SUMMARY

Nguyen has created a fact situation which Remington cannot refute, to wit that a bank officer made certain statements. Those statements allegedly created a scenario where the bank officer intended to take possession but did not, instead abandoning the property by allegedly stating that the landlord could have it. In dealing with this undisputed fact situation, the California courts simply applied the § 9504 rules as to loss of the right to recover on the Note when the creditor elects to retake the collateral and then fails to provide proper notice and conduct a proper sale.

The approach of the California court destroys in one fatal blow not only the ability of the FDIC to evaluate a failed bank's assets, but the acceptability of the packets of the bank assets which the FDIC is offering in the secondary market to investors such as Remington. The secondary market representatives inspect the packets and evaluate them the only way they can, by examination of the bank documents which the FDIC has produced therein. The bids for purchase of the packets must be submitted the next day, hardly enough time to investigate whether there exists some hidden defense to the value of the packet. This is precisely what Congress intended to regulate and limit. If the defense is not apparent in the packet, 12 U.S.C. § 1823(e)(1) forbids its introduction. Even if there is a copy of a letter in the packet from a bank officer stating that the bank intends to take possession of collateral, coupled with a copy of a letter to a landlord stating that the bank has changed its mind, these cannot be introduced by the debtor under the express prohibition of 12 U.S.C. § 1823(e)(1), because such letters would not be official bank records required before any such attack is permitted against the value of the asset set forth in the bank documents. Yet the California courts have said that nothing more than the testimony of the debtor and a property manager as to what a bank officer allegedly

said, can accomplish this very contradiction to the federal statute. The California state courts have opened the door to the virtual destruction of the Congressional intent.

The state courts have accomplished this by casually stating, without authority, that the statements of Mr. Yokomizo are not what is contemplated by 12 U.S.C. § 1823(e)(1). The state courts also made a mockery of § 9504 by equating those very statements of Mr. Yokomizo as being *acts* of physical possession and abandonment. In the process the California court of appeal has undermined and ignored the intent of those federal court decisions that found a true failure to comply with § 9504 as being beyond the agreement stage contemplated by § 1823(e)(1), and therefore a bar to recovery without violating the intent and purpose of FIRREA. The state courts must be informed that they cannot play fast and loose with the clear and controlling federal law. These courts also should be presented with a clear rule that, once and for all, bars *any* alleged statements of a bank officer which can then be used to create an as yet unlitigated scenario wherein such statements are then used to defeat the value of an FDIC asset acquired from a failed bank.

CONCLUSION

For all the foregoing reasons, Remington's petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 20, 1998

APPENDIX A

[Filed Aug. 12, 1997]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B100281
(Super. Ct. No. BC 128884)

REMINGTON INVESTMENTS, INC.,
Plaintiff and Appellant,

v.

XEP NGUYEN, *et al.*,
Defendants and Respondents.

APPEAL from a Judgment of the Superior Court of Los Angeles County. Stephen E. O'Neil, Judge. Affirmed.

SUMMARY

In this appeal we hold that a failed Bank's commercially unreasonable disposition of collateral for a secured loan, contrary to California Uniform Commercial Code § 9504 [1], barred its successor in interest from seeking a deficiency judgment. We reject creditor's argument that the *D'Oench, Duhme* doctrine, protecting the Federal Deposit Insurance Corporation (FDIC) from undocumented

[1] All references to code sections will refer to the California Uniform Commercial Code unless otherwise noted.

side agreements diminishing a failed bank's rights, permitted a deficiency judgment. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Respondents Xep and Quy Huynh Nguyen (Nguyens) operated a donut shop in the Greyhound Bus Terminal. In 1989 Nguyens borrowed $100,000 from Independence Bank (Bank) to buy equipment for the shop. Nguyens signed a promissory note and security agreement giving Bank a security interest in the equipment.

The security agreement provided: "Grantor [the Nguyens] shall keep the Collateral . . . at Grantor's address shown above, or at such other locations as are acceptable to Lender. Except in the ordinary course of its business, Grantor shall not remove the Collateral from its existing locations without the prior written consent of Lender. . . . [¶] . . . Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. . . ." The security agreement further specified that termination of the donut shop's business was a default, and that on default, Bank would "have full power to enter upon the property of Grantor to take possession of and remove the Collateral," and "full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in its own name or that of Grantor."

The bus terminal closed permanently on October 15, 1991, and was taken over by SAMKO, a property manager. On November 15, 1991, Mr. Nguyen wrote Bank's representative, Mr. Yokomizo, advising that Nguyens were closing the shop and would give up the equipment securing the note. Nguyen asked Bank to pick up the equipment and stated that Nguyens no longer were allowed on the premises. In response Yokomizo told Nguyen that Bank would take possession of the equipment, sell it and apply the proceeds to the loan balance. Mr. Yokomizo

prepared in Mr. Nguyen's presence an unsigned, handwritten note on Bank stationery confirming "written authorization to turn the equipment to Bank, and have us sell it." Nguyen saw Yokomizo write the note and recognized Yokomizo's handwriting. No evidence was offered in the trial court controverting Nguyens' evidence that Yokomizo confirmed Bank's intent to repossess and sell the equipment.

The Nguyens made no more loan payments and did nothing further regarding the equipment. Mr. Nguyen declared "[n]either I nor my wife was ever given notice by the Bank that it had not repossessed and sold the equipment as Mr. Yokomizo promised, or that Mr. Yokomizo had abandoned the equipment to the property management company." The Bank's records contained no other written information relating to disposition of the equipment.

In February 1992 Kathleen Wedgewood, SAMKO's general manager, allowed Mr. Yokomizo into the shop to see the equipment. Yokomizo told Wedgewood of Bank's security interest. Later that day Yokomizo notified Wedgewood that the FDIC had seized Bank, and suggested SAMKO could have the equipment.

In February 1995, when plaintiff and appellant Remington Investments, Inc. (Remington) bought the note from the FDIC, $53,795.38 remained unpaid. Remington sued in June 1995.

The parties filed cross-motions for summary judgment. Remington's motion urged the debt was undisputed. The Nguyens' cross-motion contended a deficiency judgment was barred because Bank had not sold the equipment in a commercially reasonable fashion as required by section 9504. Remington argued in opposition that the *D'Oench Duhme* doctrine, barring enforcement against the FDIC of secret side agreements between a borrower and a bank,

prevented Nguyens from arguing that Bank had agreed to repossess and sell the equipment. The trial court denied Remington's motion, and granted Nguyens'.

Remington appeals.

DISCUSSION

1. Bank's Failure To Reasonably Dispose Of Its Collateral Bars Remington's Right To A Judgment Against Nguyens.

California Uniform Commercial Code section 9504 governs secured lender efforts to recoup debts by selling personal property collateral. Subdivision (1) provides that the secured party after default may sell the collateral and apply the proceeds to defray the expenses of sale and then to reduce the debt.

Subdivision (2)(b), central to the present case, provides:

> "If the security interest secures an indebtedness, *the debtor is liable for any deficiency* [between the proceeds of sale of collateral and the debt] . . . *but only* . . . *if* the debtor was given notice, if and as required by subdivision (3), of the disposition of the collateral in accordance with subdivision (3), *and the disposition of the collateral by the secured party pursuant to this section was conducted in good faith and in a commercially reasonable manner* . . ." (Emphasis added.)

Section 9504, subdivision (2)(b) assures that creditors taking and selling debtors' property will realize reasonable value. Under subdivision (1)(b) the sale proceeds must be applied to reduce the debt, and under subdivision (2)(a) the creditor must account to the debtor for any surplus after sale. These rules operating together limit deficiency judgments to the difference between the debt

and the collateral's real value, and avoid creditor windfalls and debtor forfeitures.

Section 9504, subdivision (2)(b) enforces the requirement for commercially reasonable collateral disposition by denying deficiency judgments to creditors who do not comply.

Cessation of Nguyens' business was a default under section 9504, and under the Security agreement, Bank had the right to take the collateral and sell it to satisfy the debt. As the evidence recited above shows, Bank *exercised* these rights. Bank confirmed to Nguyens in November 1991, orally and in writing, that Bank would repossess the equipment. Consistent with this advice Bank's representative Mr. Yokomizo appeared at the Bus Station in February, and advised the manager of Bank's right to the equipment.

Bank, however, did not act in a commercially reasonable manner in disposing of the equipment. It did not sell the equipment in the fashion required by California Uniform Commercial Code section 9504. Instead, Mr. Yokomizo told Ms. Wedgewood that *SAMKO* could *have* the equipment. This conduct defeated Nguyens' statutory right to have their debt reduced by the proceeds of a commercially reasonable sale of the collateral. The statutory consequence, as noted above, is that Bank and its successor Remington are barred from seeking a deficiency judgment against Nguyens.

2. The "D'Oench Duhme" Doctrine Does Not Defeat Nguyens' Defense to A Deficiency Judgment Under Commercial Code 9504

In *D'Oenche, Duhme & Co. Inc.* v. *FDIC* (1942) 315 U.S. 447, FDIC sued a borrower on a note given to a failed bank. In defense the borrower asserted that the bank had promised not to enforce the note. No evidence

of this alleged promise appeared in the bank's records. The Supreme Court held:

> "Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced."

This holding was later codified by Congress in 12 United States Code section 1823 subdivision (e), which provides that no agreement which defeats or diminishes FDIC's interest in an asset acquired from an insured bank is enforceable unless, inter alia, it is in a writing signed by the bank and the obligor when the bank acquired the asset.

Remington contends that Bank's "agreement" to repossess the equipment diminished or defeated FDIC's rights and thus was subject to 12 United States Code section 1823, subdivision (e).

We disagree. Mr. Yokomizo's advise to Nguyens that Bank would take and sell the collateral was not an "agreement". Rather, it was an instruction directing Nguyens to comply with the requirements of a *pre-existing agreement*, the security agreement, which gave Bank an unqualified right to repossess, and deprived Nguyens of all right to dispose of the collateral for their own benefit.

Further, Yokomizo's advice to Nguyens of Bank's intent to repossess did not defeat or diminish rights of Bank or its successor. Instead, the notice was one of several steps required under section 9504 to preserve and protect Bank's right both to sell the collateral and obtain a deficiency judgment. The notice benefited Bank rather than impairing its interest.

The interests of Bank and FDIC were defeated, not by Yokomizo's advice to Nguyens of Bank's intent to re-

possess, but rather by his later careless conduct in giving away the collateral to SAMKO.

The trial court correctly concluded that *D'Oenche, Duhme* and 12 U.S.C. 1823, subdivision (e), did not afford a defense against Nguyens' cross-motion for summary judgment.

DISPOSITION

The trial court's summary judgment is affirmed. Respondents shall recover their costs on appeal.

NEAL, J.

We concur:

LILLIE, P.J.

JOHNSON, J.

APPENDIX B

[Filed Oct. 22, 1997]

Second Appellate District, Division Seven, No. B100281
S064439

IN THE SUPREME COURT OF CALIFORNIA

REMINGTON INVESTMENTS INCORPORATED,
Appellant

v.

XEP NGUYEN *et al.*,
Respondents

Appellant's petition for review DENIED.

/s/ George
Chief Judge

APPENDIX C

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 7

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2 Civil B100281
Los Angeles NO. BC128884
Judge: O'NEIL, S.

REMINGTON INVESTMENTS, INC.

vs.

NGUYEN, XEP

REMITTITUR NOTICE

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 08/12/97 is now final.

Affirmed In Full.

Respondents Shall Recover Their Costs On Appeal.

Oct. 31, 1997

JOSEPH A. LANE
Clerk

By: /s/ E. Amin
Deputy Clerk

APPENDIX D

12 USCS § 1823 (1997)

§ 1823. Corporation Monies

* * * *

(e) Agreements against interests of Corporation.

(1) In general. No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [*12 USCS § 1821*], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

* * * *

APPENDIX E

§ 9501. Default; Procedure When Security Agreement Covers Both Real and Personal Property

Text of section operative until Jan. 1, 1999.

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this chapter and, except as limited by subdivision (3), those provided in the security agreement. The secured party may reduce his or her claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies, and duties provided in Section 9207. The rights and remedies referred to in this subdivision are cumulative.

(2) After default, the debtor has the rights and remedies provided in this chapter, those provided in the security agreement, and those provided in Section 9207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivision referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subdivision (3) of Section 9504 and Section 9505) and with respect to redemption of collateral (Section 9506), but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if those standards are not manifestly unreasonable:

(a) Subdivision (2) of Section 9502 and subdivision (2) of Section 9504, insofar as they require accounting for surplus proceeds of collateral and deal with the debtor's liability for any deficiency;

(b) Subdivision (3) of Section 9504 and subdivision (1) of Section 9505 that deal with disposition of collateral;

(c) Subdivision (2) of Section 9505 that deals with acceptance of collateral as discharge of obligation;

* * * *

§ 9504. Secured Party's Right to Dispose of Collateral After Default; Notification of Sale; Publication; Effect of Disposition

Text of section operative until Jan. 1, 1999.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to:

(a) The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed and to the satisfaction of any subordinate attachment lien or execution lien pursuant to subdivision (b) of Section 701.040 of the Code of Civil Procedure if notice of the levy of attachment or execution is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reason-

able proof of his or her interest, and unless he or she does so, the secured party need not comply with his or her demand.

(2)(a) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus except as provided in Section 701.040 of the Code of Civil Procedure.

(b) If the security interest secures an indebtedness, the debtor is liable for any deficiency unless otherwise agreed or otherwise provided in the Retail Installment Sales Act, and in particular Section 1812.5 of the Civil Code or any other statute, but only (i) if the debtor was given notice, if and as required by subdivision (3), of the disposition of the collateral in accordance with subdivision (3), and the disposition of the collateral by the secured party pursuant to this section was conducted in good faith and in a commercially reasonable manner or (ii) except for secured transactions entered by a debtor primarily for personal, family, or household purposes, as provided in paragraph (c).

(c) If the secured party has provided notice to the debtor pursuant to subdivision (3), if so required, but has not proceeded in a commercially reasonable manner in the disposition of the collateral, the debtor is liable, subject to paragraphs (b) and (d), for any deficiency only if the balance of the indebtedness immediately before the disposition exceeds the amount that the secured party establishes would have been realized had the disposition of the collateral by the secured party pursuant to this section been conducted in conformity with the conditions set forth in clause (i) of paragraph (b), and the liability is limited to the excess. This paragraph does not apply to secured transactions entered by a debtor primarily for personal, family, or household purposes.

(d) Notwithstanding paragraph (c), if any one or more of the conditions set forth in clause (i) of paragraph

(b) are not proved by the secured party to be satisfied with respect to the disposition, then the debtor is not liable for any deficiency if either:

(i) All of the collateral immediately before the disposition was consumer goods and the amount of the indebtedness immediately before the disposition was one hundred thousand dollars ($100,000) or less.

(ii) The amount of the indebtedness immediately before the disposition was fifty thousand dollars ($50,000) or less.

(e) Upon entry of a final judgment that the debtor is not liable for a deficiency by reason of either paragraph (c) or paragraph (d), the secured party may neither obtain a deficiency judgment nor retain a security interest in any other collateral of the debtor that secured the indebtedness for which the debtor is no longer liable.

(f) To the extent, subsequent to a disposition that does not satisfy any one or more of the conditions set forth in clause (i) of paragraph (b), or subsequent to a collection that does not satisfy the condition set forth in clause (i) of paragraph (c) of subdivision (2) of Section 9502, the secured party disposes pursuant to this section of other collateral securing the same indebtedness, the debtor may, to the extent he or she is no longer liable for a deficiency judgment by reason of paragraph (c) or paragraph (d), or by reason of paragraph (d) or paragraph (e) of subdivision (2) of Section 9502, recover the proceeds realized from the subsequent dispositions, as well as any damages to which the debtor may be entitled if the subsequent disposition is itself noncomplying or otherwise wrongful. Except for secured transactions entered by a debtor primarily for personal, family, or household purposes, neither the subsequent dispositions nor the exercise of any other remedy by the secured party subsequent to a noncomplying disposition or collection shall be deemed tortious or otherwise wrongful based, in whole or in part,

on the fact that it occurred subsequent to a noncomplying disposition or collection.

(g) If the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides. The provisions of subdivision (b) of Section 701.040 of the Code of Civil Procedure relating to the payment of proceeds and the liability of the secured party apply only if the security agreement provides that the debtor is entitled to any surplus.

(h) Nothing herein shall deprive the debtor of any right to recover damages from the secured party under subdivision (1) of Section 9507 or to offset any such damages against any claim by the secured party for a deficiency, or of any right or remedy to which the debtor may be entitled under any other law; provided, however, that, except in the case of any secured party that has willfully failed to conduct the disposition of collateral in good faith and in a commercially reasonable manner or in the case of a debtor who entered the secured transaction primarily for personal, family, or household purposes, any damages recoverable by the debtor shall be reduced by the amount of any deficiency that would have resulted had the disposition of the collateral by the secured party been conducted in conformity with the conditions set forth in clause (i) of paragraph (b) regardless whether or not the debtor is liable for the deficiency under paragraph (b) or (c).

Supreme Court, U.S.
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No. 97-1193

In The

Supreme Court of the United States

OCTOBER TERM, 1997

REMINGTON INVESTMENTS, INC.,
Petitioner,
v.
XEP NGUYEN, ET AL.,
Respondents.

Petition For Writ Of Certiorari
To The California Court of Appeal
For The Second Appellate District, Division Seven

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does a state court of appeal properly find that a holder of a note from a failed bank is barred from collecting on the note when: (1) the undisputed facts show that the bank abandoned the collateral which secured the note under a commercial business loan and security agreement; and (2) relevant state statutory law prohibits recovery by a lender when the lender improperly disposes of securing collateral?

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PRELIMINARY STATEMENT

This Court exercises its discretion to grant a petition for certiorari only when motivated by "special and important reasons." S. Ct. Rule 10.1. Contrary to petitioner Remington Investment, Inc.'s characterizations, no such reasons exist here. The lower court's not-for-publication decision is of no special interest to anyone except the parties involved. It does not unsettle or create any conflict of law, does not ignore the supremacy of federal jurisprudence (to the extent that federal law is even implicated) and does not even serve as citable precedent for parties outside the confines of this dispute. Accordingly, Respondents, Mr. Xep Nguyen, et al., respectfully request that this Court deny the petition seeking review of the unpublished opinion of the California Court of Appeal, Second Appellate District, Division Seven.

COUNTERSTATEMENT OF THE CASE

When Greyhound closed its downtown Los Angeles bus terminal, Mr. Nguyen's doughnut shop located in the terminal was forced to close too. (Pet 2a) Mr. Nguyen surrendered the collateral for the shop's business loan under his security agreement with the bank. (Pet. 2a-3a) The bank, however, abandoned the collateral, and when the FDIC took over the bank, Remington purchased the "asset" of Mr. Nguyen's note and attempted to collect from him. (Pet. 3a) Remington's efforts failed because the surrendered collateral was not disposed of in a commercially reasonable manner as required by the California Commercial Code. (Pet. 4a-5a) All of this is set forth concisely and completely in the unpublished opinion below. (Pet. 1a-7a)

The factual statement in Remington's petition contains several points requiring response. First, Remington states, "Nguyen has not disputed the unpaid balance on the Note." (Pet. 2) Not so. Mr. Nguyen's position has always been that he does not owe any outstanding balance because the undisputed facts show that he surrendered collateral which should have satisfied the remaining debt.

Second, Remington states that there was no testimony as to what happened to the collateral [Pet. 4], but then surmises that the "collateral seemed to have disappeared." (*Id.*) Yet Remington may not draw the conclusion that the collateral was ever moved or "disappeared" because there is admittedly no evidence on that point. Along the same lines, Remington asserts it "had no way of locating the bank officer." (Pet. 4) Not so. Witnesses *can* be located when parties *try* to find them. Here, Remington made no effort to contact any of the persons involved. Indeed, Remington never conducted any discovery in this case, instead hoping it could win solely on the law, regardless of the facts. As a result, Mr. Nguyen's evidence -- the only factual evidence presented to the trial court -- was controlling and that evidence showed how the bank abandoned the collateral.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Result Reached Here Was Based On California's Commercial Code Without Implicating Federal Law

Remington accuses the California Court of Appeal of ignoring the supremacy of federal law in reaching the decision below. But the Court of Appeal ignored none of Remington's arguments and the opinion is well within the mainstream of the established law, both state and federal. The foundation for the opinion is the unremarkable proposition that if a debtor surrenders collateral under a security agreement, then the creditor must act reasonably in disposing of that collateral and failure to reasonably dispose of collateral bars subsequent attempts to collect a judgment on the debt. (Pet. 6a) Remington attempts to invoke federal (and state) law to disregard the relevant facts and excuse the bank's abandonment of the collateral. But as the court of appeal held below, these arguments are unavailing when the *record* is considered.

For example, Remington argues that the bank never took possession of the collateral but merely expressed an intent to do so. (Pet. 5, 10) Remington asserts -- without citation to any legal authority -- that a "secured party retains the option [of using collateral to offset a debt] until it has clearly taken possession of the collateral." (Pet. 18) But whether possession over collateral has been taken is hardly a matter of federal concern. Indeed, it is a highly fact-dependent legal question determined as a matter of state law under California's Commercial Code.

Remington's failure to conduct discovery also prevents it from disputing the facts, which reveal that the bank exercised its right to take the collateral by: (1) confirming orally and in writing that it was going to do so; (2) sending a bank officer to visit the premises, gaining entry by showing the property management company the bank's security interest in the equipment inside the building; and (3) exercising control over the property by giving it away. This conduct defeated the Nguyen's ability to use the collateral to satisfy the debt and therefore barred Remington from further relief.

Mr. Nguyen had done all that a reasonably borrower could do. After relinquishing the collateral he could fairly assume that the bank would handle things from there. He had no responsibility or ability to ensure that the bank would properly handle his collateral and he had no idea the bank had failed to do so until he was sued four years later by Remington.

B. The Federal D'Oench Duhme Doctrine Does Not Apply Here Because There Was No Side-Agreement To Impair Bank Assets

Remington argues that review is needed to prevent California's courts from "playing fast and loose with the clear and controlling federal law" (Pet. 22) But it is Remington who plays fast and loose with the facts and law in its petition. Remington presents a one-sided view of the law -- never mentioning the contrary authority cited by Mr. Nguyen. Remington further unfairly characterizes the state court's rulings and reasoning to make it appear that two trial court judges and three appellate court justices

somehow overlooked relevant federal precedent. But Remington took every opportunity to highlight the law it believed to be relevant; and every judge who has reviewed the factual record and that law concluded it simply does not apply. The D'Oench Duhme doctrine has not been ignored; it simply has no application here.

In that regard, Remington never confronts the analysis reflected in the California Court of Appeal's unpublished opinion, because it cannot. That court found D'Oench Duhme inapplicable because there was no agreement to impair bank assets. First, there was no agreement of the sort contemplated by the doctrine -- only instructions directing compliance with the requirements of a pre-existing commercial security agreement. That form contract provided that the loan collateral had to remain at the doughnut shop and in case of default the bank would have full power to enter the premises and dispose of the collateral to offset the debt. Thus it was already an integral part of the contract that the collateral would cover the loan and thus there was no side deal of the sort D'Oench Duhme aims to prevent.

Second, the election to take collateral did not defeat or diminish bank assets; indeed, the election was a benefit to the bank. If the bank's interests were defeated here, it was not because the bank opted to exercise its right to the collateral, but by the bank's own carelessness in mishandling that collateral.

Therefore, the court of appeal perceived that the factual predicate for application of Remington's federal law -- *i.e.*, a side-agreement to diminish bank assets -- was absent. (Pet. 5a-6a) And because the obligation to dispose of surrendered collateral in a commercially reasonable way

is statutorily required [Cal. Com. Code § 9504(3)], it is not the sort of side-agreement to diminish assets assailable by D'Oench, Duhme. (Pet. 6a) As the opinion concludes, any diminishment of bank assets here occurred simply as a result of the bank's own "careless conduct." (*Id.*)

Further, the determination that the D'Oench, Duhme doctrine does not apply to situations of improper disposal of collateral (the conclusion reached by every judge who has examined this case) is consistent with other relevant authority nationwide. *E.g., S&S Diversified Servs. v. Arguello*, 911 F. Supp. 498, 503 (D. Wyo. 1995) (improper disposal of collateral "is of an entirely different type [of defense] than the secret side agreements that are barred by the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e)"); *accord, Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975 (5th Cir. 1992).

Simply put, Remington portrays this case to be far more momentous than it is. It is not a case where an FDIC assignee could not produce a bank officer -- Remington never tried -- or where a scheme was concocted by debtors and accomplices to defraud a lender.[1]

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[1] Remington's reference to its other pending petition for certiorari (*Remington v. Hamedani*, No. 97-984) is inapposite as that case concerns vastly different facts and relevant law (*e.g.*, no issue regarding abandonment of collateral; offensive, rather than defensive, use of D'Oench Duhme). The only similarity is Remington's reliance on an inapplicable doctrine.

CONCLUSION

The unpublished decision of the California Court of Appeal correctly analyzed the issues and found, on the undisputed facts, that summary judgment was properly granted. No factors should motivate this Court to exercise discretion to address this case which poses no legal conflict or important public policy issues. This matter simply fails to present the sort of substantial legal question deserving of review by the highest court in the land. The parties and judicial system already have invested far more resources examining a bank's failure to collect the collateral of Mr. Nguyen's doughnut shop than should ever have been incurred. Remington's petition for a writ of certiorari should be denied.

Respectfully submitted,

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